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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/795,936

Filing Date: March 08, 2004

Appellant(s): GIMELLI ET AL.

Ellen Plotkin
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed January 4, 2008 appealing from the Office action mailed September 5, 2007.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows:

Claims allowed: none.

Claims pending: 1, 5, 7-9, 11, 13 and 19-20.

Claims canceled: 2-4, 6, 10, 12 and 14-18.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

EP 0350552 VENTRES et al 1-1990

US 6,217,819 OH et al 4-2001

Francis, Frederick J. (1999). Wiley Encyclopedia of Food Science and Technology (2nd Edition) Volumes 1-4. John Wiley & Sons.

Online version available at:

<http://www.knovel.com/knovel2/Toc.jsp?BookID=681&VerticalID=0, p.605>

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 5, 7-9, 11 and 13 are rejected under 35 U.S.C. 102(b) as being anticipated by Ventres et al (EP 0350552). Wiley Encyclopedia of Food Science and Technology is cited as evidence, as discussed below.

Ventres et al disclose a method for producing a dried, uncooked farinaceous-based food product (alimentary pastes) and the dried, uncooked farinaceous-based food product (Abstract).

In regard to claim 1, Ventres et al disclose using "glutinous flour" (p. 3 line 40).

Ventres et al disclose that "glutinous flour" provides a self-supporting paste when mixed with water (p. 3 lines 40-44). Ventres et al disclose that the paste made with "glutinous flour" "will substantially retain its original form at ambient conditions or after subsequent processing, such as drying or cooking" (p. 3 lines 40-44). Ventres et al disclose that "[p]referred glutinous flours are semolina and durum flour" (p. 3 lines 55-56). Ventres et al also disclose "[s]emolina flour, also referred to as "semolina" herein, is a common, hard, coarse, wheat flour obtained from durum wheat" (p. 3 lines 44-45). Ventres et al disclose "[t]he glutinous flour preferably comprises at least 75% by weight of the dry ingredients (p. 3 lines 54-55, p.9 Examples 5-10). Further in regard to claim 1, Ventres et al disclose that the moisture content of the final product (dried paste) is below 14% by weight of the paste (p.6 line 50, p.15 claim 20). Since Ventres et al disclose that the moisture content (water content) of the final dried pasta product is below 14%, the amount of dried ingredients is above 86%. Therefore the amount of glutinous flour (flour comprising gluten protein) is above 65%. Further in regard to claim 1, Ventres et al disclose the farinaceous-based food product comprising a hydrophobic ester (glycerol monostearate) (p. 4 line 21). Ventres et al disclose that the farinaceous-based food product contains about 0.3 % by weight glycerol monostearate (p. 9 Table III).

Ventres et al disclose farinaceous-based food product comprising a protein additive such as dried egg (p. 3 line 59, p. 15 claim 14). Ventres et al disclose that amount of additives (dried egg) is less than 25% by weight of dry ingredients (p.15 claim 14). Since Ventres et al disclose that amount of dried ingredients in the farinaceous-

based food product is above 86%, and Ventres et al disclose that amount of additives (dried egg) is less than 25% by weight of dry ingredients, therefore the amount of protein additive (dried egg) is below 22%.

In regard to claim 5, Ventres et al disclose egg as a protein additive (p. 3 line 59, p. 15 claim 14).

In regard to claim 7, Ventres et al disclose that glycerol monostearate is a suitable additive and is commonly found in commercial pastas (p. 4 lines 21-22). As evidenced by Wiley Encyclopedia of Food Science and Technology, the HLB number of glycerol monostearate used in foods is less than 13 (3.7 for glycerol monostearate, and 5.5 for self-emulsifying glycerol monostearate) (p.605 Table 2).

In regard to claim 8, Ventres et al disclose glycerol monostearate (p. 4 line 21).

In regard to claim 11, Ventres et al disclose the moisture level of the farinaceous-based food product at the time of extrusion and as an extruded mixture at or below 28% by weight (p. 4 line 9, p.9 Examples 5-10). Further in this regard Ventres et al disclose that "the alimentary paste in the extruder has a moisture content in the range of from 20 to 26% by weight of the paste" (p. 15 claim 10).

In regard to claim 13, Ventres et al disclose farinaceous-based food product additives such as vitamin and spinach vegetable solids (p. 3 line 58, p.4 line 1, p. 15 line 14).

Regarding electron microscopy image limitations in claims 1 and 9, it is noted that since Ventres et al meets the limitations of claims 1, 5, 7-8, 11 and 13, and since Ventres et al discloses the farinaceous-based food product that is made using the same

ingredients and amounts as recited, and since Ventres et al discloses a similar method of making such product (mixing flour, water, protein additive and hydrophobic ester, extruding the mixture in an extruder, drying the extruded mixture), then the microscopic image of the disclosed product would inherently display the same properties as recited in the claims, absent any clear and convincing evidence and/or arguments to the contrary.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 19 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ventres et al in view of Oh et al (US 6,217,918).

Ventres et al is taken as cited above.

Ventres et al do not disclose a meal kit comprising farinaceous-based food product.

In regard to claims 19 and 20, Oh et al disclose “[a] convenience food product comprising a microwavable pasta packaged in a container which facilitates even cooking in a microwave oven” (Abstract). Oh et al disclose that ingredients for pasta comprise semolina, durum and protein additive (egg) (Col. 8 lines 60-61, Col. 9 lines 3-6). Oh et al also disclose “[t]he present invention overcomes the problems associated with the prior art by providing a microwave container having a combination of geometric features which enhance the efficiency and uniformity of microwave cooking by taking into account the dielectric properties of the liquid food products being cooked and the geometry of the container in relation to the microwave wavelength” (Col. 2 lines 29-37).

Since Ventres et al disclose farinaceous-based food product comprising durum semolina and protein additive, and Oh et al disclose a convenience food product comprising a microwavable pasta packaged in a container which facilitates even cooking in a microwave oven and use of the same ingredients as disclosed by Ventres et al, it would have been obvious to one of ordinary skill in the art to modify the invention of Ventres et al and to package pasta in a microwavable container in order to produce a convenience food product which would facilitate even cooking in a microwave oven as taught by Oh et al.

(10) Response to Argument

Appellant's arguments filed January 4, 2008 have been fully considered but they are not persuasive.

On page 6 of the Brief, Appellant states that several features found in claim 1 are not disclosed by the reference. In particular, on page 7 of the Brief Appellant states that "Nowhere does Ventres even make reference to a flour mixture with at least about 50.0% by weight of the flour mixture comprising gluten protein, nor that glutinous flour means one having at least about 50.0% by weight of the flour mixture comprising gluten protein, and there can be no anticipation due to the difference (1) as stated above".

Examiner respectfully disagrees. As stated in the Office action mailed September 5, 2007, Appellant is referred to page 5 of the instant Specification:

The flour suitable for use to make the farinaceous-based food product of this invention may be, for example, bean, barley, oat, potato, soy, *durum semolina*, buckwheat, rice, kamut, corn, rye, spelt, bleached, unbleached, whole wheat, yam, gluten flour or mixtures thereof, with the proviso that at least about 50.0%, and preferably, at least about 60.0%, and most preferably, from about 65.0% to about 100.0% by weight of the flour employed comprises gluten protein (i.e., prolamines and glutelins). *In an especially preferred embodiment, the farinaceous-based food product of this invention comprises 100.0% durum semolina as the flour source.*

Ventres et al disclose using "glutinous flour" (p. 3 line 40). Ventres et al also disclose using semolina flour obtained from durum wheat (i. e. durum semolina) (p. 3 lines 44-45). Ventres et al also disclose that non-glutinous flours may be added, but not necessarily, and therefore Ventres discloses using 100% of glutinous flour (durum semolina) in the flour mixture (p. 3 lines 40-59). Therefore Appellant's arguments are not persuasive.

On page 7 of the Brief, Appellant states that "Ventres at Claim 14 on page 15 referred to in the Office Action fails to disclose about 1.0% to about 15.0% by weight of

a protein additive with sufficient specificity to constitute anticipation". Examiner respectfully disagrees. Ventres et al disclose that amount of additives (dried egg) is less than 25% by weight of dry ingredients (p.15 claim 14). Since Ventres et al disclose that amount of dried ingredients in the farinaceous-based food product is above 86%, and Ventres et al disclose that amount of additives (dried egg) is less than 25% by weight of dry ingredients, therefore the amount of protein additive (dried egg) is below 22%.

Further in this regard, in claim 14, Ventres et al disclose that the alimentary paste comprises one or more additional materials selected from non-glutinous flour, seasoning, dried egg, etc. Therefore, the additives as recited in claim 14 of Ventres are not optional at this point, but required. Regarding the range of the protein additive, the range disclosed by Appellant is of about 1.0% to about 15.0%. Ventres et al teaches the range of less than 22%. The range of less than 22% as taught by Ventres et al would reasonably be interpreted as from 0 to 21.9999% and thus, according to said interpretation, Ventres et al teaches of a range that overlaps with the instantly recited range, and encompasses points which read directly upon the claimed invention. It is also noted that the range as disclosed by Ventres et al fully encompasses the range as instantly claimed. Therefore Appellant's arguments are not persuasive.

On page 8 of the Brief, Appellant states that Ventres fails to disclose about 4.0% to about 18.0% by weight water in the product with sufficient specificity to constitute anticipation. Examiner respectfully disagrees. Ventres et al disclose that the moisture content of the final product (dried paste) is below 14% by weight of the paste (p.6 line 50, p.15 claim 20). The range disclosed by Appellant is of about 4.0% to about 18.0%

by weight. Ventres et al teaches the range of below 14% by weight. The range of below 14% by weight as taught by Ventres et al is being interpreted as from 0 to 13.9999% and thus, according to that interpretation, Ventres et al teaches of a range that overlaps with the instantly recited range, and encompasses points which read directly upon the claimed invention. Therefore Appellant's arguments are not persuasive.

Regarding Appellant's arguments about inherency (p. 8 of the Brief), it is noted that although the reference does not specifically disclose every possible quantification or characteristic of its product, including electron microscopy image data, the electron microscopy image data would have been expected to be in the claimed range absent any clear and convincing evidence and/or arguments to the contrary. The reference discloses the same starting materials and methods as instantly (both broadly and more specifically claimed), and thus one of the ordinary skill in the art would recognize that the microscopy image data, among many other characteristics of the referenced product, would have been an inherent result of the product disclosed therein. The Patent Office does not possess the facilities to make and test the referenced product, and as reasonable reading of the teachings of the reference has been applied and does anticipate the instant claims, the burden thus shifts to Appellant to demonstrate otherwise. Therefore Appellant's arguments are not persuasive.

Appellant's arguments regarding rejections under USC § 103 have been fully considered but they are not persuasive.

In response to Appellant's argument that the references fail to show certain features of Appellant's invention (pp. 9-10 of the Brief), it is noted that the features upon

which Appellant relies (i.e., drying of pasta) are not recited in the rejected claim(s).

Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

In response to Appellant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). As stated in the previous Office Action, in regard to claims 19 and 20, Oh et al disclose “[a] convenience food product comprising a microwavable pasta packaged in a container which facilitates even cooking in a microwave oven” (Abstract). Oh et al disclose that ingredients for pasta comprise semolina, durum, protein additive (egg), and water (Col. 8 lines 60-61, Col. 9 lines 3-6). Oh et al also disclose “[t]he present invention overcomes the problems associated with the prior art by providing a microwave container having a combination of geometric features which enhance the efficiency and uniformity of microwave cooking by taking into account the dielectric properties of the liquid food products being cooked and the geometry of the container in relation to the microwave wavelength” (Col. 2 lines 29-37). Therefore Appellant's arguments are not persuasive.

Since Ventres et al disclose farinaceous-based food product comprising durum semolina, protein additive, and water, and Oh et al disclose a convenience food product comprising a microwavable pasta packaged in a container which facilitates even

cooking in a microwave oven and use of similar ingredients as disclosed by Ventres et al, it would have been obvious to one of the ordinary skill in the art to modify the invention of Ventres et al and package pasta in a microwavable container in order to produce a convenience food product which would facilitate even cooking in a microwave oven as taught by Oh et al.

(11) Related Proceeding(s) Appendix

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Vera Stulii

/Vera Stulii/

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